TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY, INC.,
PETITIONER,

vs.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1933

CERTIORARI GRANTED MARCH 20, 1933

(37,372)

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

At Law. No. 1197

GEORGE MOORE ICE CREAM COMPANY, Atlanta, Ga., Plaintiff,

vs.

J. T. ROSE, Collector of Internal Revenue, Defendant

AMENDED PETITION—Filed March 28, 1931

Now comes the plaintiff, by its Attorney, D. J. Gantt, and with leave of the Court, amends the petition heretofore filed, so when amended, it will read as follows:

[fol. 2] 1.

"That at all times herein mentioned plaintiff was and is now a corporation organized and existing under the laws of the State of Georgia, with office and principal place of business in Atlanta, Georgia.

2

"That at the time of the alleged illegal collection of taxes hereinafter complained of, J. T. Rose, was and is now Collector of Internal Revenue for the collection district of Georgia, with office located in Atlanta, Fulton County, Georgia, and residence within said State and county.

3

"That this is a suit of a civil nature at common law, and arises under the Constitution and Laws of the United States providing for Internal Revenue.

4

"That the defendant, the said J. T. Rose, is indebted to plaintiff in the sum of $4,551.01, with interest from date

of payment thereof, at 6% per annum, on account of taxes illegally collected from plaintiff without authority of law, as will hereinafter be shown.

5

"That the plaintiff on April 1, 1918, within the time prescribed by law, duly filed its corporation income tax return for the taxable year ended December 31, 1917, disclosing a loss thereon in the sum of $21,037.25, and no tax liability.

[fol. 3] 6

"That thereafter the Commissioner of Internal Revenue caused an audit to be made of the books of the plaintiff and as a result thereof by his letter of May 24, 1921, determined that the plaintiff had a taxable net income of $16,040.18; that the average invested capital for the year 1917 was $28,416.30, and that the resulting tax liability was $6,871.18. Said letter set forth in detail items of income and invested capital.

7

"Plaintiff further shows that the tax liability so determined was based upon and resulted from certain adjustments made in net income and invested capital of plaintiff, contrary to law and not sustained by the records of the plaintiff or other evidence sustaining the conclusion.

8

"Plaintiff further shows that said amount was duly assessed in November, 1921, and that thereafter the said J. T. Rose, the defendant herein, acting as Collector of Internal Revenue for the Collection District of Georgia, claiming to act under and pursuant to the provisions of the Revenue Act of 1921, demanded of plaintiff the principal sum of $6,874.00, together with legal interest, and notified plaintiff that if payment of tax, penalty and interest was not made within ten days, that collection would be enforced by seizure and sale of plaintiff's property.

9

"That plaintiff herein, solely in order to prevent the imposition of penalties and interest, and the distraint and

[fol. 4] sale of its property, with incident cost and inconvenience, and upon compulsion and duress, paid to the defendant on November 5, 1923, the said sum of $6,874.00.

10

"That thereafter on November 5, 1927, plaintiff filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, for transmission to the Commissioner of Internal Revenue, copy of which is attached hereto and marked Exhibit "A"; that thereafter on or about November 13, 1928, and January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929.

11

"Said claim for refund, together with supplemental data as recited in above paragraph, was referred by the Commissioner of Internal Revenue to the Internal Revenue Agent in Charge, Atlanta, Georgia, and was assigned to Revenue Agent H. E. Smith for verification, and after examination he determined that plaintiff was rightfully entitled to a refund of $4,551.01 based upon a corrected tax liability of $2,322.98. Copy of letter acknowledging such corrected tax liability is attached hereto and marked Exhibit "B."

[fol. 5] 12

"That thereafter on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full.

13

"Plaintiff further alleges said collection of the sum of $6,874.00 was illegal, void, and without authority of law, for the reason that said tax for the calendar year 1917, was computed upon an incorrect income and invested capital, in that the tax was computed upon a taxable net income of $16,940.18 and an average invested capital for the year 1917 of $28,416.30.

14

"That for the taxable year 1917, the correct taxable net income is $9,546.35; the correct average invested capital is $27,823.40, and the correct tax liability is $2,322.99.

15

"That no part of said sum of $6,874.00 has been refunded or repaid to plaintiff, or credited to any tax payments due by it, and that plaintiff is entitled to recover the sum of $4,551.01, with interest thereon from date of payment at 6% per annum."

Wherefore, petitioner, prays judgment for the principal sum of $4,551.01, with legal interest from date of payment.

Plaintiff, further amends said petition by striking Counts One and Two of said original petition, together with all amendments thereto.

[fol. 6] Wherefore plaintiff prays that this its amendment be allowed.

D. J. Gantt, Attorney for Petitioner, 321 Healey Building, Atlanta, Georgia.

Duly sworn to by Geo. Moore. Jurat omitted in printing.

ORDER ALLOWING AMENDMENT

Read and considered.

It is hereby ordered, that the foregoing amendment be allowed, subject to demurrer, and with privilege of defendant to answer.

It is further ordered that all pleadings heretofore filed in conflict with this amendment, be and the same are hereby

stricken, and that in lieu thereof, this amendment is to be treated for all purposes as an original petition.

This the 28th day of March, 1931.

E. Marvin Underwood, United States District Judge.

[fol. 7] EXHIBIT "B" TO PETITION

Treasury Department, Internal Revenue Service, Atlanta, Ga.

February 21, 1929.

Mr. Wm. M. Leppard, Candler Bldg., Atlanta, Ga.

In re George Moore Ice Cream Co.

DEAR SIR: Find herewith agreement form 866 prepared for the signatures of the officers of the above named corporation. You will note that the corrected tax liability is $2,322.98. Originally or previously assessed $6,873.99, refund due $4,551.01.

The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporate seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date.

Respectfully, H. E. Smith, Revenue Agent.

EXHIBIT "A" TO PETITION

Treasury Department, Internal Revenue Service

Claim

Revised June, 1930

To be filed with the Collector where assessment was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[fol. 8] X Refund of Tax Illegally Collected

STATE OF GEORGIA,
County of Fulton, ss:

Name of taxpayer or purchaser of stamps: George Moore Ice Cream Company, Inc., (Street) 51 East Alabama Street, (City) Atlanta, (State) Georgia.

The Deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Georgia.

2. Period (if for income tax, make separate form for each taxable year: From Jan. 1, 1917, to Dec. 31, 1917.

3. Character of assessment or tax: Income and Profits Tax.

4. Amount of assessment: $—, dates of payment: (a) Nov. 5, 1923.

6. Amount to be refunded: $6,871.18.

The deponent verily believes that this claim should be allowed for the following reasons:

(a) See Copy of Collector's Letter dated December 6, 1926 attached.

First. The collection of this tax was made after *after* the five year period as provided in Section 250(d) Act of 1921 and was illegal.

[fol. 9] The due date for filing returns for this period was extended until April 1, 1918, and Section 250 (d) of the Act of 1921 which was retroactive provided that the amount of Income and Excess Profits taxes due for this year, 1917, shall be assessed and collected within five years from the date return was filed. Attached and forming part of this claim are additional pages 2 to 5 of letter from Collector of Internal — dated 12-6-1926.

(Signed) George Moore Ice Cream Co., by Tom Noras, Secretary. (Seal of Corporation.)

Sworn to and subscribed before me this 4th day of November, 1927. C. G. Allen, Notary Public, State at Large. (Seal of Office.)

(Blank items not indicated.)

Claim for Refund

In re George Moore Ice Cream Company, 51 East Alabama Street, Atalanta, Georgia

This tax was not collected until seven months and four days after the five year period in which the collector could be legally made.

Section 250(d) of the 1921 Act states:

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921, or succeeding taxable years shall be deter- [fol. 10] mined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

Section 250 (d) of the Act of 1921 above quoted is sustained by Supreme Court decision of the United States in the case of Frank K. Bowers, individually and as Collector vs. New York and Albany Lighterage Company and two other identical cases all of which were decided February 21, 1927.

In this decision it was held:

"1. Collection by distraint of income taxes imposed by the Revenue Acts of 1916 and 1917 is barred by Section 250(d) of the Revenue Act of 1921 five years from the time the return was filed although the taxes were duly assessed within the five year period provided by Section 250(d) of that Act.

"2. Distraint is a 'proceeding' as that term is used in Section 250(d) of the Revenue Act of 1921.

"3. The intention of Congress by Section 250(d) of the Revenue Act of 1921 was to protect taxpayers against any [fol. 11] proceeding whatsoever for the collection of tax claims not made and pressed within five years of the time the return was filed."

This tax was assessed and collected prior to the passage of the Act of 1924 and it is stated in G. C. M. 1546: VI-17-3209 that:

"The six year period of limitation on the collection of a tax after assessment provided in Section 278(d), Acts of 1924 and 1926, does not apply, where the five-year period of limitation of Section 250(d), Act of 1921, or such five-year period as extended by waivers, has expired prior to June 2, 1924, and collection cannot be made in such cases either by distraint or a proceeding in Court. G. C. M. 1546; VI-17-3209."

Second

A percentage used in computing the variable deduction for excess profits should be allowed equal to the same percentage allowed similar corporation engaged in the same line of business.

This corporation is a continuation of the business previously conducted by George Moore as an individual, however, prewar net income and invested capital are not available.

Taxpayer was only allowed 7% variable deduction in the Computation of Excess Profits Tax for the year 1917 and now requests that there be allowed the same deduction that similar corporations engaged in the same line of business were allowed as provided in Article 23 of Regulations No. 41, which states:

"When income for prewar period cannot be satisfactorily determined, or when net income was low during prewar pe- [fol. 12] riod, or where there was no net income during prewar period—in the following cases the deduction shall be determined as provided in this article:

(a) If the Secretary of the Treasury is unable satisfactorily to determine the average amount of annual net income of the trade or business for the prewar period;

(b) If the Secretary of the Treasury upon complaint finds that during the prewar period the percentage of the net in-

come to the invested capital of the taxpayer was lower by 1 per cent or more than *than* the percentage of the net income to the invested capital of representative corporations, partnerships or individuals engaged in a like or similar trade or business during the same period.

(c) If, in the case only of a domestic corporation or partnership which was in existence during the prewar period, or if a citizen or resident of the United States who was engaged in the trade or business during the prewar period, the Secretary of the Treasury upon complaint finds that during the prewar period there was no net income from the trade or business.

In such cases the deduction shall be—

(1) An amount equal to the same percentage of the invested capital for the taxable year which the average deduction (determined in the same manner as provided in Article 21, without including the $3,000.00 or $6,000.00 therein referred to) for such year of representative corporations, partnerships, or individuals engaged in a like or similar trade or business, is of their average invested capital for such year, plus

(2) In the case of a Domestic Corporation $3,000.00, and in the case of a Domestic Partnership or a Citizen or Resident of the United States $6,000.00." * * *

[fol. 13] Third

Special Assessment Claimed under Section 210 of the Act of 1917

Agent's report, dated May 24, 1921, for the year 1917 shows the following:

Invested capital	$28,416.30
Sales	218,019.12
Gross profit	119,746.02
Salaries of officers	3,300.00
Net income	16,940.00
Excess profits tax	6,228.48

The percentage of Excess Profits Tax to net income shown above is approximately 37%.

It is believed that this is an abnormal percentage of Excess Profits Tax to Net Income and that a comparison with the tax paid by other corporations in the same line of business similarly situated will show that it is in excess of the tax paid by representative concerns in the same line of business.

It is also believed that the fact that taxpayer had no prewar net income and invested capital creates an additional abnormal condition entitling it to consideration for Special Relief.

It is further believed that the fact that the low officers' salaries paid during this year creates an abnormal condition in net income.

The following officers' salaries were paid:

President	$1,800.00
Treasurer	1,500.00
	$3,300.00

[fol. 14] The busines was incorporated February 10, 1916, at which time it took over a going business conducted for many years by the President, George Moore. Stock was issued for the tangible assets only and no value was placed on the Good Will. There is no doubt but that Good Will existed and that its value should have been capitalized. It is believed that this creates a further abnormal condition in Invested Capital.

Fourth

Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
	$4,269.87

and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers' books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a difference result it will be submitted as additional evidence.

[fol. 15] STATE OF GEORGIA,
County of Fulton:

Personally appeared before me Wm. M. Leppard, who, being duly sworn, deposes and states:

That he has been employed by George Moore Ice Cream Co., Inc., to prepare the attached claim for refund for the calendar year 1917.

That he has prepared said claim from the records of taxpayer and from his knowledge of the Income Tax Regulations and that the statements therein given as facts he knows to be true and all other statements made upon information and belief, he believes to be true.

Wm. M. Leppard.

Sworn to and subscribed before me this the 4th day of November, A. D. 1927. November, 1927. R. B. Fortum, Notary Public, State at Large, Ga.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S DEMURRER TO AMENDED PETITION—Filed April 11, 1931

(Caption omitted)

Now comes J. T. Rose as United States Collector of Internal Revenue for the District of Georgia, the above named defendant, and demurs generally and specially to plaintiff's original petition as amended filed in the above entitled case on the 28th day of March, 1931, and for demurrer says:

[fol. 16] General

1. Because plaintiff's petition as amended fails to set forth a cause of action against this defendant.

Special

1. Defendant demurs specially to Paragraph 6 of said petition as amended because the facts are not clearly stated and the defendant is not sufficiently notified in detail as to the facts contained in said letter and because said letter is not made a part of said paragraph as an Exhibit thereto, and further because said paragraph states conclusions drawn from said letter and because it is not shown what the facts are claimed to be set forth in detail in said letter as to items of income and invested capital.

2. Defendant demurs specially to Paragraphs 8 and 9 of said petition as amended because the facts as stated in said paragraphs do not show a compliance with the law in regard to the plaintiff being required to make payment under protest and the facts as stated in said paragraphs do not show that the payment was made under protest.

3. Defendant demurs specially to Paragraph 11 of said petition as amended because this defendant is not responsible for any act performed by Revenue Agent H. E. Smith and he further demurs specially for the reason that it does not appear whether the determination that plaintiff was rightfully entitled to a refund of $4,551.01 was made by the Revenue Agent or by the Commissioner. Said paragraph fails to state that the United States Commissioner of Internal Revenue determined that plaintiff was rightfully entitled to a refund of said amount based upon a correct tax liability of $2,322.98.

[fol. 17] 4. Plaintiff further specially demurs to Exhibit "B" referred to in said Paragraph 11 and attached to said petition because it is irrelevant, immaterial, and has no binding force on this defendant.

5. Defendant demurs to the last paragraph in said petition as amended which is in the following words:

"Plaintiff further amends said petition by striking any and all parts of questions 1 and 2 of said original petition

together with all amendments thereto in conflict with this amendment,"

because it is not definitely stated which parts of questions 1 and 2 of said original petition are in conflict with this amendment and defendant is not put upon notice what parts of the original petition he is required to answer.

Wherefore defendant prays judgment of the Court that his demurrer be sustained and that plaintiff's petition as amended be dismissed.

C. P. Goree, Assistant United States Attorney and Attorney for the Defendant.

I hereby certify that the foregoing demurrer, general and special, is well founded in point of fact in my opinion.

C. P. Goree, Assistant United States Attorney and Attorney for the Defendant.

[File endorsement omitted.]

[fol. 18] In United States District Court

Opinion—Filed Sept. 30, 1931

(Caption omitted)

Wm. H. Barrett, District Judge:

The petition of plaintiff as amended is in one count and alleges in brief that on April 1, 1918, plaintiff filed its corporation income tax return for the year 1917, disclosing a loss of $21,037.25 and no tax liability; that the commissioner of internal revenue caused an audit to be made of the books of plaintiff and as a result thereof declared a tax liability of $6,871.18; that "the tax liability so determined was based upon and resulted from certain adjustments made in net income and invested capital of plaintiff"; that such amount was duly assessed in November, 1921, and thereafter said J. T. Rose, acting as Collector of Internal Revenue, demanded of plaintiff the principal sum of $6,874.00 and interest; that plaintiff under compulsion and duress paid said Rose on November 5, 1923, the sum of

$6,874.00; that on November 5, 1927, plaintiff filed with said collector a claim for refund, of which a copy is attached (all parts of such claim for refund have been eliminated by the amendments to the petition except this:

"Fourth. Apparent errors in adjustments in invested capital at December 31, 1916, and in net income for 1917.

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
Total	$4,269.87

[fol. 19] and that these accounts should be restored to Invested Capital. An audit is now being made of taxpayer's books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,-047.25. The Agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a different result it will be submitted as additional evidence");

that "on or about November 13, 1928, and January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the Commissioner accepted the claim without objecting to it as sufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929; that said claim was supplemental data was referred by the Commissioner of Internal Revenue to the internal revenue agent

in charge, Atlanta, Georgia, and revenue agent H. E. Smith on February 21, 1929, wrote a letter to W. M. Leppard, representing plaintiff, that plaintiff was entitled to a refund of $4,551.01 (by amendment, allowed August 10, 1931, the facts upon which such letter was based are set forth as follows:

"Net Income on which Commissioner based additional assessment of	$6,873.99	$16,940.18
[fol. 20] Less:		
Coca Cola rebates due Customers at December 31, 1917	$5,666.10	
Checks outstanding for purchases December 31, 1917	2,188.55	
Total	$7,854.65	
Plus:		
Checks issued in 1916 and paid in 1917	460.82	
Net reduction		7,393.83
Corrected Net Income		9,546.35

These items are definitely identified on Schedule G of Exhibit 'D' of the amendment to the claim, filed January 2, 1929, with the exception of the item of $460.82, which is on Schedule 'B' of said amendment to the claim"),

and that on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full.

There is nothing to indicate that the Commissioner of Internal Revenue authorized Smith to bind the government or that the commissioner ratified Smith's action. There was no protest made at the time of payment by the plaintiff.

The defendant demurs to such petition generally and on five special grounds.

Defendant plants himself squarely upon the principle involved in the following language of Justice Holmes in Rock Island etc. v. United States, 254 U. S. 141, 143:

"Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with."

[fol. 21] In but one case do I find this principle criticized even by implication and that, it seems to me, is more a criticism of the legislative rather than the judicial branch of the government, when Judge McDermott, in Howbert v. Penrose, 38 Fed. (2nd) 577, (10th C. C. A.), declares, after citing such statement that "The government ought to turn square corners when dealing with its citizens."

Two reasons are urged in support of the general demurrer.

1. The tax was paid without protest. It is not questioned that if this suit had been filed prior to the Revenue Act of 1924 it could not be maintained against such objection; but the plaintiff insists that Sec. 1014(a) of such Revenue Act, amending Rev. St. Sec. 3226, (U. S. C. A.) Title 26, Sec. 156, reversed such rule. A review of the cases dealing with this section is so fully made by Judge Burrows in Warner v. Walsh, 27 Fed. (2nd) 952 it would be supererogatory to repeat it here. The subsequent decision of Judge Brewster, in Leach v. Nichols, 42 Fed. (2nd) 918, does not alter my opinion that Judge Burrows' opinion was correct.

2. Title 26, Sec. 156 U. S. C. A. provides:

"No suit or proceeding shall be maintained in any Court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

[fol. 22] Article 1304, Regulations 69, of the Treasury Department contains the following provision:

"Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions as to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth in detail under oath."

Plaintiff's original claim for refund was filed on the last day allowed by law. By amendments all elements of such

claim for refund have been abandoned except the "Fourth," as set forth in the foregoing statement. The aforesaid letter from H. E. Smith, revenue agent, under date of February 21, 1929, is as follows:

"Find herewith agreement Form 866 prepared for the signatures of the officers of the above named (plaintiff) corporation. You will note that the corrected tax liability is $2,322.98. Originally, or previously assessed $6,873.99, refund due $4,551.01.

The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporation seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date."

Manifestly the claim now urged by the plaintiff is based upon such letter.

The most casual examination discloses that this can not fairly be considered an amendment of the original claim for refund but, fairly considered, is an original claim. As such it is filed too late. It is deemed unnecessary to elaborately discuss the decisions bearing upon this question. In addition to the principle in Rock Island etc. v. United States, [fol. 23] supra, reference may be had to Art Metal Construction Co. v. United States, 47 Fed. (2nd) (2nd C. C. A.) 558; United States v. Felt & Tarrant Mfg. Co., 51 Sup. Ct. Rep. 376, and Mutual Life Insurance Company of New York v. United States, Court of Claims, 49 Fed. (2nd) 662.

The result is that the general demurrer will be sustained and this renders unnecessary consideration of the special demurrers.

Let an order be taken accordingly.

This 28th day of September, 1931.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING GENERAL DEMURRER AND DISMISSING PLAINTIFF'S PETITION AS AMENDED—Filed Oct. 3, 1931

In conformity with the Court's Opinion handed down and filed in this case on the 30th day of September 1931, it is considered, ordered and adjudged by the Court that the foregoing General Demurrer be and the same is hereby sustained and that plaintiff's petition as amended be and the same is hereby dismissed.

This 2nd day of October, 1931.

W[illegible]. H. Barrett, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Jan. 2, 1932

(Title omitted)

The petitioner, George Moore Ice Cream Company, a corporation organized and existing under and by virtue of the [fol. 24] laws of the State of Georgia, being aggrieved by the order and judgment made and entered on the third day of October, 1931, by this Court, which sustains the general demurrer filed by the defendant to plaintiff's petition, and dismissing the proceeding in conformity with an opinion rendered by the Court on September 30, 1931, prays that this appeal may be allowed and that a transcript of the record of the proceedings and papers upon which the said order and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated Atlanta, Georgia, this 28th day of December, 1931.

D. J. Gantt, J. C. Murphy, Attorneys for Petitioner, 427 Hurt Bldg., Atlanta, Ga.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed Jan. 2, 1932

(Caption omitted)

On reading the petition of George Moore Ice Cream Company, made on its behalf by D. J. Gantt and J. C. Murphy, attorneys for said corporation dated the 28th day of December, 1931, for appeal and consideration of assignment of errors presented therewith it is

Ordered that the appeal herein be allowed as prayed for, and it is further

[fol. 25] Ordered that a certified transcript of record of all proceedings be transmitted to the Circuit Court of Appeals for the Fifth Circuit.

Dated Atlanta, Georgia, December 30th, 1931.

Wm. H. Barrett, Judge of the United States District Court for the Northern District of Georgia.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Jan. 2, 1932

(Caption omitted)

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which it will rely upon the prosecution of the appeal in the above entitled cause from the order made and entered herein by this Court on the third day of October, 1931.

The Court erred in sustaining the general demurrer to plaintiff's petition, and in dismissing said petition, for the following reasons:

1. The Court erred as a matter of law in entering an order dismissing plaintiff's petition and proceeding on the ground that said petition failed to state a cause of action against the defendant.

2. The Court erred in holding and finding by his opinion that plaintiff could not recover the amount sued for on the ground that the payment had been made without protest.

3. The Court erred as a matter of law in holding that the claim for refund, a copy of which set up in the original petition and amendments thereto, was not sufficient to authorize recovery under title 26, Section 156 United States Code of America, and under Article 1304, Regulation 69, of the Treasury Department.

[fols. 26 & 27] 4. The Court erred as a matter of law in holding and finding that the information and facts submitted to the Commissioner of Internal Revenue as set forth in amendment allowed by the Court September 28, 1931, was not to be considered an amendment to the original claim for refund, but, finally considered, is an original claim.

5. The Court erred in sustaining the general demurrer and in failing to hold that said petition stated a good cause of action.

Wherefore plaintiff prays the judgment of the District Court of the United States for the Northern District of Georgia, be reversed and that the United States District Court be directed to hear and consider such evidence as may be submitted by plaintiff in support of its complaint, and to proceed with the trial of the cause according to law.

Dated Atlanta, Georgia, December 29, 1931.

D. J. Gantt, J. C. Murphy, Attorneys for George Moore Ice Cream Company, 427 Hurt Building, Atlanta, Georgia.

[File endorsement omitted.]

Bond on appeal for $250.00, approved and filed January 2, 1932, omitted in printing.

[fol. 28] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Jan. 23, 1932

(Caption omitted)

To Honorable Olin C. Fuller, clerk of the United States District Court for the Northern District of Georgia:

You are hereby requested to make and certify a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to an appeal allowed in the above entitled proceeding, to include the following:

1. Amended petition filed on behalf of Plaintiff and allowed March 28, 1931.

[fol. 29] 2. Demurrer filed by counsel for Defendant to the amended petition.

3. Opinion of Honorable W. H. Barrett, United States Judge, entered and filed on the 3rd day of October, 1931.

4. Judgment and order filed and entered the 3rd day of October, 1931, by Honorable W. H. Barrett, United States Judge, finally dismissing plaintiff's petition.

5. Plaintiff's assignments of errors.

6. Plaintiff's appeal and order allowing same.

7. Citation of said appeal.

8. This præcipe.

J. C. Murphy, D. J. Gantt, Attorneys for George Moore Ice Cream Company, Plaintiff.

Acknowledgment of Service

Service of the above præcipe admitted and a copy received this the 23d day of January, 1932. It is agreed and stipulated that the foregoing documents are all that are necessary for the consideration of the case by the United States Circuit Court of Appeals for the Fifth Circuit.

C. P. Goree, Assistant U. S. Attorney and Attorney for Defendant.

[File endorsement omitted.]

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE CITATION

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 31] Minute entry of argument and submission, October 12, 1932, omitted in printing.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6522

GEORGE MOORE ICE CREAM COMPANY, INC., Appellant,

versus

J. T. ROSE, Collector of Internal Revenue for the District of Georgia, Appellee

Appeal from the District Court of the United States for the Northern District of Georgia

(November 9, 1932)

Before Bryan, Hutcheson, and Walker, Circuit Judges

OPINION OF THE COURT—Filed November 9, 1932

WALKER, Circuit Judge:

This was an action brought on March 28, 1931, by the appellant against the appellee, Collector of Internal Revenue, to recover the principal sum of $4,551.01, with interest, that sum being part of the amount, $6,871.18, assessed against appellant, in November, 1921, as a deficiency of income and profits taxes for the year 1917, and paid by him [fol. 33] on November 5, 1923. Appellant's petition alleged the filing by him on November 5, 1927, of a claim for refund. That petition as it was amended showed that the only

ground stated in the claim for refund which was relied on in the suit was the following:

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917.

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
	$4,269.87

and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a different result it will be submitted as additional evidence."

The amended petition, after alleging the filing of the claim for refund, alleged as follows:

"That thereafter on or about November 13, 1928, and [fol. 34] January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929.

Said claim for refund, together with supplemental data as recited in above paragraph, was referred by the Commissioner of Internal Revenue to the Internal Revenue

Agent in Charge, Atlanta, Georgia, and was assigned to Revenue Agent H. E. Smith for verification, and after examination he determined that plaintiff was rightfully entitled to a refund of $4,551.01 based upon a corrected tax liability of $2,322.98. Copy of letter acknowledging such corrected tax liability is attached hereto and marked Exhibit 'B'.

That thereafter on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full."

The letter, a copy of which was made Exhibit 'B,' was dated February 21, 1929, and the body of it was the following:

"Find herewith agreement form 866 prepared for the signatures of the officers of the above named corporation. You will note that the corrected tax liability is $2,322.98. Originally or previously assessed $6,873.99, refund due $4,551.01.

[fol. 35] The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporate seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date."

It appears from the opinion rendered, but not from the record proper, that by amendment of the petition, allowed August 10, 1931, the facts upon which the above set out letter was based were set forth as follows:

"Net Income on which Commisisoner based additional assessment of $6,873.99		$16,940.18
Less:		
Coca Cola rebates due Customers at December 31, 1917	$5,666.10	
Checks outstanding for purchases December 31, 1917	2,188.55	
Total	$7,854.65	
Plus:		
Checks issued in 1916 and paid in 1917	460.82	
Net reduction		7,393.83
Corrected Net Income		9,546.35"

The petition as amended did not allege that the alleged payment by appellant was made under protest. The Court sustained a demurrer to the petition as it was amended, and dismissed that petition.

[fol. 36] In argument in behalf of the appellee it was contended that the action of the Court in sustaining the demurrer to the amended petition is sustainable on the grounds: (1). That the suit was not maintainable because the amended petition did not show that the alleged payment exacted of the appellant was made under protest; and, (2), That the amended petition did not show that the ground therein stated in support of the asserted right to recover was stated in the alleged claim for refund.

1. The Revenue Act of 1924 (26 U. S. C. A. §156, 43 Stat. 343) introduced into the provision with reference to suits for the recovery of taxes wrongfully collected the provision, "but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress." Prior to the enactment of the quoted provision an over-payment of income taxes without protest was not recoverable from the Collector of Internal Revenue. Fox v. Edwards, 287 Fed. 669; Warner v. Walsh, 24 Fed. (2), 449. The alleged excessive payment was made by the appellant before the enactment of that provision, but this suit was brought after that provision was enacted. That a Statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. United States v. St. Louis Star Ry. Co., 270 U. S. 1. The suit asserts a personal liability of the appellee. Sage v. United States, 250 U. S. 33. At the time of the alleged over-payment by the appellant without protest, it did not subject appellee to any enforceable liability. A result of permitting the maintenance of the suit would be to give to a subsequently enacted Statute the effect of creating a personal liability for the doing of an act which at the time it was done did not give rise to any liability. To say the least, it is not clear that the quoted provision of the Statute was intended to, or con-

[fol. 37] stitutionally could, have the effect attributed to it. Fullerton Co. v. Northern Pacific Ry. Co., 266 U. S. 435; Warner v. Walsh, 27 Fed. (2), 952. But is is not necessary to pass on the question under consideration if the allegations of the amended petition do not show that appellant would

have been entitled to recover anything if his alleged overpayment had been made under protest.

The timely filing of a claim for refund according to regulations established pursuant to Statute is a prerequisite of the existence of a right to sue for the recovery of illegally exacted taxes. 26 U. S. C. A. §156; Tucker v. Alexander, 275 U. S. 228; J. P. Stevens Engraving Co. v. United States, 53 Fed. (2), 1; Snead v. Elmore, 59 Fed. (2), 312. A Regulation in force at the time appellant's claim for refund was filed requires that "All facts relied upon in support of the claim should be clearly set forth in detail under oath." Regulations 69, Art. 1304. The only ground stated in appellant's claim for refund which was invoked by his amended petition was the one above set out. That part of the claim for refund,—which was filed on the last day on which it legally could be filed (26 U. S. C. A. §157),—consisted of the statement of a belief that error was committed in eliminating specified items of assets from the statement of appellant's invested capital, and the statement with reference to an alleged uncompleted audit that if that audit reflects a different result it will be submitted as additional evidence. The just mentioned statement with reference to an audit cannot be regarded as a clear setting forth in detail of a fact or facts relied upon in support of the claim for refund. It imported no more than that if an audit then being made should reflect a different result from the one just mentioned it would be submitted as additional evidence. It did not indicate a purpose to challenge the exacted tax on a ground other than the previously stated one based on the elimina-[fol. 38] tion from appellant's invested capital of described items of assets. The amended petition did not allege that the items mentioned were eliminated from appellant's invested capital. It challenged the exacted tax, not on a ground stated or suggested in the claim for refund, but on the ground that two described items should be deducted from the stated amount of net income upon which the challenged assessment was based, and that another described item should be added to that amount, no one of which three items was in any way mentioned in the claim for refund. It was not open to the appellant by his suit to challenge the exacted tax upon a ground wholly different from the one stated in his claim for refund. United States v. Felt & Tarrant Co., 283 U. S. 269. The allegations of appellant's amended peti-

tion do not show that it was made known to the Commissioner of Internal Revenue that the exacted tax was challenged by appellant on a ground not stated in the latter's claim for refund, or that that official considered, or was called on to consider, any ground of attack on that tax which was not stated in the claim for refund. This being so, the appellant was not entitled by his suit to challenge that tax on a ground not set out in his claim for refund. It follows that the Court did not err in sustaining the demurrer to the amended petition.

The judgment is affirmed.

[fol. 39] In United States Circuit Court of Appeals, Fifth Circuit

No. 6522

George Moore Ice Cream Company, Inc.,

versus

J. T. Rose, Collector of Internal Revenue for the District of Georgia

Judgment—November 9, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 40] [File endorsement omitted]

In United States Circuit Court of Appeals, Fifth Circuit

[Title omitted]

Petition for Rehearing—Filed November 29, 1932

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the appellant and brings this its petition for a rehearing, and for cause shows:

1

The decision promulgated by this honorable court in the above cause November 9, 1932, affirms the judgment below on the ground that the claim as filed was insufficient to authorize recovery under Section 156, title 26 U. S. C. A. and under regulations 69, article 1304.

[fol. 41]

2

The opinion apparently does not give consideration to the following allegations in appellant's petition:

"* * * that thereafter on or about November 13, 1928, and January 2, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929."

3

Petitioner shows that the United States Supreme Court granted petitions for writ of certiorari to the Court of Claims in the case of the United States, Petitioner, v. Factors and Finance Company (No. 141), and petition for writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit in the case of The United States of America, Petitioner, v. Henry Prentiss & Company (No. 234), at the October term of said court (53 S. Ct. pp. 18, 22), wherein the Supreme Court of The United States took under consideration the question of whether or not claims insufficient when filed may be amended after the expiration of the period of limitations applicable to the filing thereof, and when so amended may authorize the recovery of overpayments under said Section 156, title 26 U. S. C. A.

[fol. 42] Wherefore petitioner prays that the order heretofore entered in said cause be set aside and that petitioner be granted a rehearing.

J. C. Murphy, D. J. Gantt, Petitioner's Attorneys.

Duly sworn to by J. C. Murphy. Jurat omitted in printing.

[fol. 43] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—December 20, 1932

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] Supreme Court of the United States

Order Allowing Certorari—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,372. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 675. George Moore Ice Cream Company, Inc., Petitioner, vs. J. T. Rose, Collector of Internal Revenue for the District of Georgia. Petifor a writ of certiorari and exhibit thereto. Filed February 9, 1933. File No. 37,372.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

In the Supreme Court of the
United States

OCTOBER TERM, 1938

No. 575

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue
for the District of Georgia,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. C. MURPHY,
Attorney for Petitioner,
427 Hurt Building,
Atlanta, Ga.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of George Moore Ice Cream Company, a corporation organized and existing under and by virtue of the laws of the State of Georgia, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, plaintiff in the United States District Court for the Northern District of Georgia, brought suit against the Collector of Internal Revenue for the recovery of $4,551.01 alleged to be overpayment of income taxes for the taxable

year 1917. (R. 1-6.) General demurrer was filed to the amended petition which was sustained by the United States District Court on the ground that it was not alleged that protest was not made at the time the additional tax in controversy was paid and on the ground of insufficiency of the claim for refund. (R. 18-23.) The court below sustained the decision of the United States District Court upon the ground of insufficiency of the claim for refund without deciding the necessity for protest. 61 Fed. (2d) 605.

The original return for 1917 was filed April 1, 1918, and disclosed a loss of $21,037.25 and no tax liability. (R. 2.)

Thereafter the Commissioner, upon audit of the books determined a deficiency of $6,871.18 based upon adjustments to net income and invested capital, which was assessed in November, 1921 and paid Novmber 5, 1923 in order to prevent the imposition of penalties, interest, and the distraint and sale of its property. (R. 3.) Thereafter on November 5, 1927 petitioner filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, the material parts of which are as follows:

"6. Amount to be refunded ..... $6,871.18.

"The deponent verily believes that this claim should be allowed for the following reasons: * * *

"Fourth.

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in net income for 1917. * * *

"The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

"If the audit now being made reflects a difference result it will be submitted as additional evidence."

Thereafter on or about November 13, 1928, and January 2, 1929, and before the Commissioner had acted on the claim, deailed statements showing all the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim. (R. 4, 5.) After the amendments were filed the claim was referred to an Internal Revenue Agent, H. E. Smith, who on February 21, 1929 sent to the taxpayer's attorney, Wm. M. Leppard, official form 866 for the signature of the officers and fixing the tax liability at $2,322.98 and the refund due, $4,551.01. (R. 4, 7.) The claim was rejected September 8, 1929. (R. 5.)

The original claim was based upon four grounds but all were abandoned in the suit except that of

over-assessment as shown on page 14 of the record

The amended petition was filed on the 28th day of March, 1931 and does not allege payment under protest. (R. 6.)

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

It is believed that the decision below is probably in conflict with the decision of this Honorable Court in the following cases: *United States, Petitioner v. Factors & Finance Company, Respondent*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287; and *United States* v. *Memphis Oil Company*, No. 308, decided January 9, 1933, 53 S. Ct. 278.

While the court below did not decide the issue of protest as a condition precedent to suit, Judge Barrett of the United States District Court held that protest was a necessary condition precedent to recovery, the collection having been made prior to the passage of the Revenue Act of 1924 and the suit commenced thereafter. The United States District Court therefore has decided an important question of Federal law which has not been, but should be, settled by this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of

Appeals for the Fifth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 6522, George Moore Ice Cream Company, Inc., Appellant v. J. T. Rose, Collector of Internal Revenue for the District of Georgia, Appellee, and that the said decree and judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just; and your petitioner will ever pray.

GEORGE MOORE ICE CREAM COMPANY.

By J. C. Murphy,

Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 61 Fed. (2d), page 605. The opinion of the United States District Court for the Northern District of Georgia is shown in the record, pages 18 to 23.

II

JURISDICTION.

The order of the Circuit Court of Appeals sustaining the decision of the United States District Court for the Northern District of Georgia was

entered November 9, 1932. Petition for rehearing was filed November 29, 1932, and denied December 20, 1932. (R. 40, 43.) Jurisdiction is conferred upon this court by Section 240(a) of the Judicial Code as amended by the act of February 13, 1925.

The suit in the District Court by the plaintiff was for the recovery of amounts paid as additional corporation income taxes, (R. 2-5), and the decisions below involve construction of said taxing acts. (R. 18-23, R. 32, 38.)

III

STATEMENT OF THE CASE.

A full statement of the case has been given under the head "A" in the petition and, in the interest of brevity, the statement is not repeated at this point.

IV

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Fifth Circuit erred in finding and holding that the claim for refund, and allegations in connection therewith, were not sufficient to authorize recovery under 26 U. S. C. A. paragraph 156, 43 Stat. 343.

2. The United States District Court for the Northern District of Georgia erred in finding and holding that payment under protest is a condition precedent to recovery under said section.

3. The United States District Court for the Northern District of Georgia errer in sustaining the General Demurrer and dismissing the peti-

tion, and the United States Circuit Court of Appeals for the Fifth Circuit erred in sustaining the court below.

V

ARGUMENT

POINT A

THE CLAIM FOR REFUND WAS SUFFICIENT BECAUSE AMENDED PRIOR TO REJECTION

The decision below is contrary to and in conflict with the decision of this Honorable Court in the following cases: *United States* v. *Memphis Oil Company*, No. 308, October Term, 1932, decided January 9, 1933, 53 S. Ct. 278; *United States* v. *Factors & Finance Company*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287.

The petition alleges that the claim for refund was amended before rejection by a detailed statement showing all of the items entering into and making up net income and invested capital. (R.4.) The original claim clearly indicated that the net income and invested capital would be questioned. (R. 14.)

POINT B

THE SUIT WAS BROUGHT AFTER THE PASSAGE OF THE REVENUE ACT OF 1924 AND THEREFORE PROTEST WAS NOT NECESSARY

The Revenue Act of 1924 by Section 1014 (43 Stat. 343), amended Section 3226 by providing, "But such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been

paid under protest or duress", and by Section 1014(b) by providing that the section should not affect any proceeding in court instituted prior to the enactment of the act.

The payment of the tax in controversy was made prior to the enactment of the Revenue Act of 1924, (R. 4), but the suit was commenced after the passage of that Act. (R. 6.)

Without the amendment to Section 3226 R. S. (C. 234, 1014(a) 43 Stat. 343) eliminating the necessity for protest, petitioner would not have had a cause of action against the defendant. Congress had the power to create a cause of action which had not existed before. *Sage et al.* v. *United States*, 250 U. S. 33. *United States* v. *Hvoslef*, 237 U. S. 1. And Congress had such power in suits against Collectors of Internal Revenue as well as in suits against the United States. *Daniel Reeves, Inc.* v. *Anderson*, No. 463; *Wright & Taylor, Inc.* v. *Lucas, Collector of Internal Revenue*, No. 565, decided January 26, 1931. 282 U. S. 409.

The necessity for protest did not go to the question of the existence of liability, and therefore the rule did not create a fixed right. *Mascot Oil Company* v. *United States*, No. 400 and *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, No. 508, decided January 26, 1931. 282 U. S. 434.

The following decisions of District Courts sustain the contention that the amendment eliminat-

ing the necessity for protest applied to all suits thereafter filed, regardless of prior payment. *Weir* v. *McGrath, Collector of Internal Revenue*., 52 *McCaughn*, 52 Fed. (2d) 205; *Leach* v. *Nichols*, 42 Fed. (2d) 918; *Warner* v. *Walsh*, 24 Fed. (2d) 449.

The intention of Congress to make the amendment eliminating protest apply to all suits thereafter filed is clearly indicated by the Senate Report applicable thereto, which is presented in full as follows:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed." Report No. 398, 68th Congress, First Session.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end

a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals and finally reverse it.

J. C. MURPHY,

Counsel for Petitioner.

February 1, 1933.